

STATE OF IOWA
DEPARTMENT OF COMMERCE
UTILITIES BOARD

IN RE: LTDS CORPORATION	DOCKET NO. TCU-01-13 (FCU-00-4)
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FINAL DECISION AND ORDER

(Issued January 9, 2002)

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BACKGROUND AND PROCEDURAL HISTORY

On August 28, 2000, LTDS Corporation (LTDS) filed a complaint against Iowa Telecommunications Services, Inc., d/b/a/ Iowa Telecom (Iowa Telecom), pursuant to Iowa Code §§ 476.101(8) and 476.3(1) and 199 IAC Ch. 6. In its order of December 22, 2000, resolving the complaint, identified as Docket No. FCU-00-4, the

Utilities Board (Board) expressed concern that, based on the facts presented, a mutual exchange of traffic might be lacking. Based on the testimony and evidence presented at the time of the complaint proceeding, Local Internet Service Company (LISCO), an affiliated Internet service provider (ISP), was the only customer of LTDS.

After the issuance of its December 22, 2000, order, the Board informally monitored LTDS' subsequent actions to see if it was behaving as a bona fide competitive local exchange carrier (CLEC). The Board became concerned that LTDS did not appear to be meeting the obligation established in the December 22, 2000, order to aggressively market competitively priced services throughout its service territory. Therefore, on June 5, 2001, the Board issued an order directing LTDS to show cause as to why its certificate should not be revoked pursuant to Iowa Code § 476.29(9) (2001). The proceeding was identified as Docket No. TCU-01-13.

In its June 5, 2001, order to show cause, the Board requested that LTDS respond to seven enumerated concerns each of which is discussed in this order. On August 14, 2001, the Board issued an order granting Iowa Telecom intervention in the proceeding as a matter of right pursuant to the provisions of 199 IAC 7.2(7)"d"(1).

On June 19, 2001, LTDS filed a motion to dismiss the certificate revocation proceeding asserting that the Board failed to provide adequate notice of the specifically alleged inadequacies pursuant to 199 IAC 22.20(5)"b," and did not allow LTDS a reasonable time to cure. In addition, LTDS asserted that the investigative

findings of the Board's staff did not satisfy the requirements necessary to trigger this revocation proceeding.

On August 28, 2001, the Board issued an order denying LTDS' motion to dismiss and taking official notice of the record in Docket No. FCU-00-4.

A hearing was held on August 28, 2001, for the purpose of receiving testimony and cross-examination of all testimony. LTDS and Iowa Telecom filed initial post-hearing briefs on September 28, 2001. Both parties filed their reply briefs on October 5, 2001.

ISSUES

A. Whether LTDS has met the Board's requirement of aggressive marketing and increasing its customer base as set forth in the Board's December 22, 2000, order.

In its December 22, 2000, order in Docket No. FCU-00-4, the Board expressed concern that LTDS was not acting as a bona fide CLEC. (Order, p. 5.) At the time the order was issued, LISCO, an ISP provider and parent company to LTDS, was the only customer of LTDS. (Id.) Specifically, the Board expressed concern that LTDS' certificate may have been a facade, enabling LTDS to obtain uncompensated or undercompensated interconnection to the incumbent's telecommunications network at the expense of other telecommunication companies or the end-user customers. (Id.)

Pursuant to deregulation under Iowa Code § 476.1D, the Board's jurisdiction does not extend to unswitched data services (private line) such as the services

provided to LISCO. The Board does not issue certificates to companies providing only non-jurisdictional services. If LTDS were not to provide a substantial amount of switched voice services and instead only provide unswitched data services to LISCO, it would not be a CLEC. Consequently, the Board ordered LTDS to demonstrate that it is a bona fide CLEC by aggressively marketing competitively priced services throughout the service territory (Id.)

The record in this docket indicates that LTDS is serving approximately 20 voice customers other than LISCO, all of whom are in the Fairfield exchange. (Tr. 169.) However, LTDS' tariff lists more than 80 exchanges in which it is authorized to provide voice service. While the record shows that LTDS will soon be offering voice services in the Mt. Pleasant exchange, and later in the Knoxville, Pella, and Ottumwa exchanges (Tr. 37, 82), LTDS has not shown a significant increase in voice customers from the time of the December 22, 2000, order.

LTDS has provided several reasons for its slow increase in voice customers. LTDS intends to provide voice services to its customers through a voice-over digital subscriber line (VoDSL) technology. (Tr. 73.) LTDS testified that its planned VoDSL product is fully "open access" where a customer can have LTDS for its multiple voice lines and have anyone as its data provider. (Tr. 110,127, 176-77.) The record indicates that LTDS' VoDSL technology requires collocation provisioning by Iowa Telecom. (Tr. 73, 138.) While Iowa Telecom states that all collocation spaces were turned over to LTDS on April 4, 2001 (Tr. 222), LTDS states that the collocation

spaces were not ready to begin testing customers until June 8, 2001. (Tr. 138.) This was three days after the Board issued its June 5, 2001, order to show cause.

LTDS also testified that its marketing and winning of voice customers, as required by the Board, has been constrained by unanticipated switching problems in the Chariton and Centerville exchanges in addition to collocation problems in the Fort Madison and Pella exchanges. (Tr. 142-43.) Moreover, LTDS states that its marketing efforts have been hindered by technical concerns associated with the provisioning of VoDSL services. (Tr. 29.) LTDS has quality concerns about rapidly rolling out its voice service, and as a result, it has chosen to roll out its VoDSL service to its customers slowly to maintain quality. (Tr. 29, 42.) However, LTDS has also testified that it has a waiting list of additional customers wanting its services as soon as technical problems are resolved. (Tr. 29, 42.) LTDS also testified it is in the last stage of resolving its technical problems, and after that, it anticipates its number of voice service customers will grow. (Tr. 61-64.)

LTDS asserts that the existence of its 20 customers in the Fairfield exchange proves compliance with the Board's marketing requirement in the December 22, 2000, order. (Initial Brief, p. 17.) In support of that assertion, LTDS states that it has been marketing its voice services by making personal calls on businesses fitting their target customer profile—small, multi-line businesses. (Tr. 52-53.) While LTDS' explanation as to why it has chosen to take a slower approach to marketing its services is understandable, LTDS' marketing efforts are not particularly aggressive as required by the Board. LTDS has not advertised its voice services, nor has it

provided any indication that it intends to advertise its voice services upon the resolution of its remaining technical problems. The existence of 20 voice customers in addition to LISCO in only the Fairfield exchange is not enough to satisfy the Board's requirement of aggressive marketing.

LTDS' slow increase in customers since the December 22, 2000, order is sufficient to support a conclusion that LTDS' certificate should not be revoked at this time. However, it is not enough to ultimately demonstrate that LTDS is acting as a bona fide CLEC. Therefore, the Board will require LTDS to submit quarterly reports to the Board regarding the number of voice customers it serves, the number of lines in use, and a summary of any marketing activities. This requirement will be reassessed in one year to determine whether LTDS' strategy is working, and it is clearly acting as a bona fide CLEC by furnishing jurisdictional services to a significant number of customers.

A sub-issue in the briefs in this case is whether ISP-bound data traffic is considered "telecommunication service." The issue relates to whether the Board has the authority to order LTDS to aggressively market voice services.

47 CFR § 51.100(b) states in pertinent part:

A telecommunication carrier that has interconnected or gained access under sections 251(a)(1), 251(c)(2), or 251(c)(3) of the Act, may offer information services through the same arrangement, so long as it is offering telecommunications services through the same arrangement as well. (Emphasis added).

Iowa Telecom asserts that there is a definitional distinction between "information services," such as ISP-bound traffic, and "telecommunication service." (Initial Brief, p. 9.) The distinction is that "information services" are wholesale data services. (Id.)

LTDS, on the other hand, asserts that information services are not content services, and that ISP-bound traffic is a "telecommunication service." (Reply Brief, p. 2, fn. 1.) If LTDS is correct in its definition, then LTDS would be in compliance with 47 CFR § 51.100(b), as it is providing telecommunication services through the Iowa Telecom interconnections when it carries LISCO traffic and, under federal law, LTDS is acting as a CLEC.

The FCC has stated "the service provided by LECs to deliver traffic to an ISP constitutes, at a minimum, 'information access,'"¹ not "telecommunication service." While the FCC's conclusion remains subject to review, it is current federal law.

Based on Iowa law, LTDS must defend its certificate by demonstrating that it is providing a significant amount of jurisdictional services. Moreover, the FCC's conclusion that ISP-bound traffic is "information access," requires LTDS demonstrate it is providing voice service ("telecommunication service") in addition to its ISP-bound

¹ See, In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-bound Traffic, Order on Remand and Report and Order, FCC-01-131 (CC Docket No. 99-68), April 18, 2001.

service via the interconnection agreement. Both state and federal law provide sufficient authority for the Board to order LTDS to aggressively market voice services.

B. Whether sufficient inadequacies in service and facilities were shown, pursuant to Iowa Code § 476.29(9) and 199 IAC 22.20(5), so as to support the revocation of LTDS' certificate.

LTDS asserts in its briefs submitted in this docket, that there was insufficient evidence presented to demonstrate LTDS has not provided adequate service to its customers pursuant to Iowa Code § 476.29(9). (Initial Brief, pp. 4-5.) LTDS also states that the evidence in the record does not support any violation of the Board's "adequacy of service" rules under 199 IAC 22.5(2).

The question then arises as to whether VoDSL is a true substitute for traditional analog voice service so as to satisfy the Board's "adequacy of service" rules. At the hearing in this matter, LTDS indicated that customers using the VoDSL service can dial anything that they could dial on a regular phone and have access to the same services including E-911, operator services, and long distance service. (Tr. 67, 93.) However, LTDS also indicated that while its VoDSL service has full 911 capability, it is not a lifeline service and would not be accessible during a power failure. (Tr. 155.) LTDS states, however, that the VoDSL could be powered by a universal power supply (UPS) to provide whatever length of service was required by a customer during power outages. (Tr. 155.)

The FCC, in its Line-Sharing Order,² while supportive of advanced telecommunication services such as VoDSL, stated the following concerns:

We support this type of cooperation, but distinguish voice-over-DSL and other forms of packetized voice transmission from the analog voiceband transmission that is fundamental to the line sharing we consider in this Order. Packet-based voice services are not yet a market substitute for traditional analog voice service. Packet-based services do not provide lifeline services during emergency situations such as power outages and do not generally offer E-911 functionality. (Emphasis added.)

The Board has "Emergency Operation" rules under 199 IAC 22.6(5) to "prevent or mitigate interruption or impairment of telephone service." One requirement is that central offices have a minimum of two hours battery reserve for use during power outages. LTDS' testimony indicates that it would be the customer's responsibility to provide back-up power if service is to be maintained during power outages. (Tr. 155.)

If LTDS does not have the capability to maintain its VoDSL service during a power outage, then VoDSL may not be an adequate substitute for analog voice service. Therefore, the Board will require LTDS to submit an Emergency Operations Plan pursuant to 199 IAC 22.6(5), which extends to the end user as opposed to merely the LTDS facilities. As part of this filing, LTDS should specifically address whether or how customers would maintain service during power outages.

² See Deployment of Wireline Services Offering Advanced Telecommunications Capability, Third Report and Order, CC Docket 98-147, FCC 99-355 (Dec. 9, 1999).

C. The Board's seven concerns about LTDS service.

Each party addressed the seven concerns raised during the informal investigation performed by Board staff and identified in the Board's order to show cause. The Board will discuss each concern.

1. Whether the lack of voice service in any exchange other than the Fairfield exchange indicates LTDS does not provide local exchange service.

The record shows that LTDS is currently serving approximately 20 voice customers with 300 phone numbers in Fairfield, Iowa. (Tr. 169.) LTDS has indicated that it will be offering voice service to Mt. Pleasant, Knoxville, and Ottumwa, Iowa. (Tr. 37, 82.) However, LTDS' tariff lists more than 80 exchanges in which it is authorized to provide service. LTDS indicated willingness to withdraw its tariff in exchanges where voice service is not provided. (Tr. 201.)

While the lack of voice service in any exchange other than the Fairfield exchange is not enough to support the theory that LTDS is not providing local exchange service, it does call into question whether LTDS is acting as a bona fide CLEC. Therefore, the Board will require LTDS submit quarterly reports as previously described. In addition, the Board will require LTDS to file a revision to its tariff to include only the exchanges in which it provides or imminently will provide voice service.

2. Whether the lack of an E-911 test in the Fort Madison exchange and the cancellation of operator services indicate that LTDS does not provide local exchange service.

LTDS states that it is not providing voice service in the Fort Madison exchange, which is why there was not an E-911 test or operator services. (Tr. 142.) If LTDS is not ready to provide service in the Fort Madison exchange, LTDS must amend its tariff to accurately reflect only exchanges in which it is providing or imminently will provide service.

3. Whether the cancellation of voice trunks in Pella, Chariton, and Centerville indicate LTDS does not provide local exchange service.

LTDS has explained that there were unanticipated switching problems in the Chariton and Centerville exchanges, and that it is waiting for collocation to be completed in the Pella exchange. (Tr. 143.) LTDS has affirmed that it intends to offer voice services in the Chariton, Centerville, and Pella exchanges, but that it will take some time to install the necessary equipment. (Tr. 143.)

The testimony in the record demonstrates that LTDS was overly optimistic in its initial planning, and these plans for service as well as plans for service in the Grinnell and Sigourney exchanges have not yet materialized. (Tr. 143.) While the cancellation of these voice trunks is not enough to demonstrate that LTDS does not provide local exchange service, it does call into question whether LTDS is acting as a bona fide CLEC. The Board finds that the reporting requirement, as previously described, will keep the Board apprised of LTDS' progress in rolling out voice services in these exchanges.

4. Whether LTDS' ordering of trunks in the Grinnell and Sigourney exchanges without any assigned NXX codes in those exchanges, indicates LTDS does not provide local exchange service.

The Board finds that this issue is not critical to this decision. This issue or similar issues can be addressed in a later docket if necessary.

5. Whether LTDS has done any marketing or advertising for voice customers.

In the December 22, 2000, order, the Board required LTDS to aggressively market its voice services and solicit new customers. The reason behind the Board's "aggressive marketing" requirement was to assure there would be continued growth in LTDS' voice services. The record indicates that LTDS has been marketing its voice services by making face-to-face contacts with potential small business customers, and as a result, has demonstrated some growth in its voice service since the Board's December 22, 2000, order. (Tr. 52-53.)

However, this growth is not sufficient to show LTDS is a bona fide CLEC. Therefore, the Board will continue to monitor LTDS' marketing progress through the previously described quarterly reports that LTDS will be submitting.

6. Whether the lack of residential service in LTDS' tariff is a violation of Iowa Code § 476.29(5), which requires each local exchange utility to serve all eligible customers within the utility service territory.

The issue of whether the lack of residential service in LTDS' tariff is a violation of Iowa Code § 476.29(5) requires some discussion. Iowa Code § 476.29(5) provides that "[e]ach local exchange utility has an obligation to serve all eligible customers within the utility's service territory, unless explicitly excepted from this requirement by the board." LTDS originally had a residential rate in its tariff, but later

filed a revision to its tariff to remove residential service. The revision was subsequently approved by the Board, effectively excepting LTDS from the requirement of Iowa Code § 476.29(5).

Iowa Telecom asserts that allowing LTDS to remove residential rates from its tariff essentially allows LTDS to "cherry pick" business customers and skew the competitive playing field. (Tr. 222.)

The Board has previously addressed the issue of "cherry picking." See generally In re: City of Hawarden, "Order Conditionally Approving Application for Certificate," Docket No. TCU-96-2, (September 19, 1997). See also In re: South Slope Cooperative Telephone Co., "Order Conditionally Approving Application for Modification of Certificate," Docket No. TCU-96-12, (January 13, 1997). The Board, while discouraging "cherry picking," has established that it will determine whether a CLEC must serve "all eligible customers" on an ad hoc basis after carefully analyzing the facts of each case. See South Slope.

In this case, LTDS was exempted from serving residential customers by the Board's approval of a change in its tariff. In addition, the Board placed pricing constraints on LTDS in its December 22, 2000, order, stating:

LTDS must show by its future actions that it is a bona fide CLEC by aggressively marketing competitively priced services throughout its service territory. (Emphasis added).

LTDS' testimony in the record alleges LTDS cannot currently serve residential customers economically either through resale or through the UNEs. (Tr. 33-34.) If the Board were to issue an order requiring LTDS to reinstate residential service in its

tariff, based on the information provided by LTDS, such an order may force LTDS to aggressively market a service at rates below its actual costs.

The record reflects, however, that LTDS plans to eventually provide fiber-based residential service at competitive rates. (Tr. 35.) Therefore, in addition to the previously described items to be reported by LTDS, the Board requires LTDS' quarterly submissions also contain a report showing its progress towards developing its residential service. This information will be closely monitored and assessed after one year to determine whether the Board should reexamine the residential service waiver granted to LTDS.

7. Whether the interconnection trunks ordered by the Board in its December 22, 2000, order are being appropriately used.

In its December 22, 2000, order, the Board ordered Iowa Telecom to interconnect with LTDS, but not without expressing concern. The Board indicated it was

[v]ery troubled by the possibility that a company might become a certificated local exchange company for the sole purpose of obtaining uncompensated or undercompensated interconnection to the incumbent's telecommunications network at the expense of other telecommunications companies or end-users customers. . . .The interconnection required under the federal act is intended to promote local exchange competition and is for the direct benefit of CLECs, not ISPs.

The record shows that Iowa Telecom has provided LTDS 1,320 one-way trunks, without receiving compensation. (See Exhibits 101-102 from Docket No.

FCU-00-4). The vast majority of trunks are being used for ISP traffic rather than voice traffic. (Id.). For example, of the 120 voice trunks provided to LTDS in Fairfield, Iowa, only 13 are serving voice traffic in that exchange. (Id.)

The record demonstrates that LTDS has made progress in developing a voice network (Tr. 35.) However, the amount of interconnection used for ISP traffic compared to voice traffic at the time of the proceeding is problematic. Therefore, the Board requires LTDS include in its quarterly submissions, reports reflecting the number of voice and data trunks being utilized in total and by location.

D. Whether VoDSL may be provisioned through line sharing.

One final issue briefed by the parties is whether VoDSL can be provisioned through line sharing. The record indicates that LTDS is currently leasing a full-unbundled network element loop (UNE-Loop) for \$28.12 per month. (Tr. 178.) LTDS wants to line share with Iowa Telecom so that LTDS can provide VoDSL over the high frequency portion of the loop while Iowa Telecom continues to provide analog voice services over the low frequency portion of the loop. (Tr. 185.) Iowa Telecom's monthly charge for line sharing is \$7.50 per month. (Tr. 185.)

Iowa Telecom asserts that VoDSL does not qualify for line sharing because it is a voice service, not a data service. (Tr. 220.) However, both the interconnection agreement and the FCC Line Sharing Order³ provide for such a relationship. Specifically, the Line Sharing Order provides that line sharing contemplates that the

³ See "Third Report and Order," CC Docket NO. 98-147, and "Fourth Report and Order," CC Docket No. 96-98, December 9, 1999.

incumbent LEC continue to provide plain old telephone service (POTS) on the lower frequencies of a UNE-Loop while another carrier provides data services on the higher frequencies (§ 72). The FCC does not limit the availability of line sharing to any particular technology, but only seeks to preserve the analog voice channel from significant degradation. (§ 70). In addition, Attachment 16 1.2(a) of LTDS' interconnection agreement with Iowa Telecom states:

Line Sharing will be permitted for any ADSL or voice-compatible xDSL ("DSL") technologies that are presumed acceptable for deployment pursuant to applicable FCC rules and orders. (Tr. 154.)

The Board's reading of the FCC order and the interconnection agreement is that LTDS can line share its VoDSL services with Iowa Telecom at the line sharing rate, provided Iowa Telecom continues to provide analog voice services on the lower frequency portion of the loop. If Iowa Telecom stops providing those voice services, LTDS would have to purchase the entire UNE-Loop.

E. Whether LTDS received sufficient notice of its alleged inadequacies prior to the Board initiating this proceeding.

In its initial post-hearing brief, LTDS again asserted that it was denied the procedural protections provided in Iowa Code § 476.29(9), by not being given appropriate notice of the Board's concerns following the informal investigation by Board staff, and therefore, was not given a reasonable amount of time to cure any alleged inadequacies. (Initial Brief, p. 3.)

The issue of sufficient notice is moot because the Board will not revoke LTDS' certificate at this time.

FINDINGS OF FACT

1. LTDS Corporation has demonstrated a slow increase in voice customers through face-to-face marketing techniques since the Board's December 22, 2000, order in Docket No. FCU-00-4. (Tr. 39, 44, 63.)
2. There is insufficient evidence at this time to support the revocation of LTDS Corporation's certificate for failure to provide a significant amount of jurisdictional services.
3. LTDS Corporation, at this time, has not fully complied with the aggressive marketing requirements set forth by the Board in its December 22, 2000, order in Docket No. FCU-00-4. (Tr. 169.)
4. The VoDSL service used by LTDS Corporation may not be a true substitute for analog voice service as it is not a lifeline service and may not be accessible to the end user during a power failure and may not comply with the Board's "Emergency Operation" rules under 199 IAC 22.6(5). (Tr. 155.)
5. LTDS Corporation's tariff does not accurately reflect those exchanges in which LTDS Corporation is furnishing, or imminently will furnish, jurisdictional voice services. (Tr. 201.)

CONCLUSIONS OF LAW

1. The Board has jurisdiction over the parties and the subject matter of this proceeding pursuant to Iowa Code §§ 476.29(9), 476.2, and 47 U.S.C. §§ 251 and 252.

2. LTDS Corporation, per the interconnection agreement and the FCC's Line Sharing Order, is entitled to share loops to provide its VoDSL services at the line sharing rate, provided Iowa Telecom continues to provide analog voice services on the lower frequency portion of the loop.

ORDERING CLAUSES

IT IS THEREFORE ORDERED:

1. Pursuant to the findings above, LTDS Corporation's certificate of public convenience and necessity will not be revoked at this time. This docket is terminated.

2. LTDS Corporation shall submit quarterly reports to the Board under Docket No. Iowa Code § 476.29(9). These reports shall include the number of voice customers served by LTDS Corporation, the exchanges in which those voice customers are located, the number of lines LTDS is currently using, the number of data and voice trunks being used in total and by location, a summary of marketing activities, and a description of LTDS Corporation's progress towards the development of residential service. This requirement shall be reassessed by the Board after one year.

3. LTDS Corporation shall submit an Emergency Operations Plan pursuant to 199 IAC 22.6(5) within 30 days of the date of this order, which extends to the end user as opposed to merely the LTDS facilities. As part of this plan, LTDS

Corporation shall specifically address whether or how VoDSL customers would maintain service during power outages.

4. LTDS Corporation shall file a revision to its tariff within 30 days of the date of this order, which accurately reflects only the exchanges in which LTDS Corporation is providing or will imminently provide voice service.

UTILITIES BOARD

/s/ Diane Munns

/s/ Mark O. Lambert

ATTEST:

/s/ Judi K. Cooper
Executive Secretary

Dated at Des Moines, Iowa, this 9th day of January, 2002.